A **FABULOUS RANGE SDN BHD v. HELENA K GNANAMUTHU**

COURT OF APPEAL, PUTRAJAYA
KAMARDIN HASHIM JCA
LEE SWEE SENG JCA
LEE HENG CHEONG JCA
B [CIVIL APPEAL NO: B-02(NCVC)(W)-828-04-2017]
10 MAY 2021

C ***CONTRACT:*** *Rescission – Sale and purchase agreement – Whether there was total failure of consideration – Whether vacant possession of property already taken by purchaser – Whether purchaser already exercised rights under agreement – Whether innocent misrepresentation made out – Whether defects in property could give rise to rescission – Whether defects in property rectifiable – Whether omission to rectify defects amounted to breach of warranty – Whether only entitled to damages*

D ***CONTRACT:*** *Termination – Sale and purchase agreement – Claim for rescission and breach of contract by purchaser – Whether there was innocent misrepresentation or total failure of consideration – Whether purchaser could claim both remedies – Whether rescission and breach of contract could subsist together – Whether inconsistent with one another – Whether rescission could be allowed after full conveyance of property – Grant of rescission and award of damages at same time –* E *Whether correct*

The respondent ('plaintiff') bought a three-storey bungalow residential building ('property') from the appellant ('defendant') at the price of RM2,500,000. The parties signed a sale and purchase agreement ('SPA'), a F statutory agreement in Housing Development (Control and Licensing) Act 1966 ('HDA') and in the form of Schedule G of the Housing Development (Control and Licensing) Regulations 1989, dated 28 June 2010. As the property was a show unit, the plaintiff also agreed to purchase the property together with all fixtures, fittings and interior design works in the property at the price of RM450,000 through a supplemental agreement ('SA'). On G 2 September 2013, the plaintiff terminated the SPA and the SA ('agreements') and initiated a suit against the defendant, claiming for, *inter alia*, rescission of the agreements. Nevertheless, the plaintiff continued to pay the purchase price of the property and had fully settled the same on 1 October 2014. The plaintiff then instituted a legal action against the H defendant. The plaintiff's pleaded causes of action, in essence, were for the restoration of her position as if the agreements were never entered into, *ie*, restitution, as well as for breach of the agreements. The High Court granted judgment in favour of the plaintiff, holding, amongst others, that: (i) the liquidated ascertained damages ('LAD') should be calculated until the date I the plaintiff took the keys to the property; (ii) there was misrepresentation as the defendant had represented to the plaintiff that it was going to deliver a 'luxurious and high end' property; (iii) there was a breach of the agreements, in that, the defendant did not obtain a written approval from the

plaintiff before making changes to the landscape and that the fixtures and fittings purchased on an 'as is where is' basis must be in perfect condition, without defects and the items delivered by the defendant were full of defects; (iv) the plaintiff was entitled to rescind the agreements because the defendant had failed to rectify the various defects in the property and its fixtures. Aggrieved by the decision of the High Court, the defendant appealed, contending that the HCJ erred in His Lordship's findings on the grounds that: (i) the plaintiff had affirmed the agreements; (ii) that there was no misrepresentation; and (iii) there was no total failure of consideration.

Held (allowing appeal in part)
Per Lee Heng Cheong JCA delivering the judgment of the court:

(1) The plaintiff, in seeking rescission by way of termination of the agreements, must prove that there has been a total failure of consideration whereby the defendant committed a fundamental breach of the agreements which went to the root of the agreements. There was no total failure of consideration as the plaintiff took vacant possession of the property and had exercised her rights under the agreements by taking the keys of the property, inspecting the property and submitting her defect checklist to the defendant, claiming for LAD pursuant to cl. 22(2) of the SPA and continuing to pay the bank loan, notwithstanding, having terminated the agreements and having the property transferred to her name. The plaintiff had also affirmed the agreements. In the circumstances, the plaintiff could not rescind the agreements and seek restitution. (paras 23 & 25)

(2) The remedy of rescission as a result of misrepresentation and breach of contract could only be awarded if the plaintiff could prove innocent misrepresentation or a total failure of consideration. The defects were not because of the building defect and the property was not inhabitable. The plaintiff did not elect whether to pursue her claim on the ground of misrepresentation or breach of contract and instead, proceeded to claim both remedies, which were inconsistent with one another, and both could not be allowed to subsist or co-exist together. There could be no rescission arising out of innocent misrepresentation after full conveyance of a property. Thus, the grant of an order of rescission and an award of damages, at the same time, was wrong and contrary to decided cases. (paras 38, 41, 42 & 44)

(3) The plaintiff did not rely on the brochure of the property, exh. P34, in coming to a decision to purchase the property but rather, as a result of inspections made on several visits to the property. Since the plaintiff had seen and inspected the property after having looked at exh. P34, there was no issue of the plaintiff relying solely on exh. P34 and there was no misrepresentation based on exh. P34. Since there was no innocent misrepresentation, the remedy of rescission was not available to the plaintiff. (paras 47-49)

(4) When a party terminates an agreement relying on a breach of a non-fundamental term, such termination is unlawful. Notwithstanding the various defects in the property, they were rectifiable and the property and the fittings which were the subject matter of the agreements, was still habitable. As such, the breaches were not fundamental and were that of a warranty and the refusal or omission of the defendant to rectify the defects did not entitle the plaintiff to claim for rescission. The plaintiff was only entitled to damages. The plaintiff's termination of the agreements on the premise of breach of warranty was unlawful and such unlawful termination was a breach of the agreements. (paras 59-61 & 63)

(5) The decision of the High Court was thus set aside, except the award of the LAD for the sum of RM62,232.90 with the interest. The plaintiff's claim should be limited to damages arising from the failure of the defendant to make good of the defects and to comply with the specific conditions as stipulated in the SPA and the SA. (para 65)

Case(s) referred to:

Admiral Cove Development Sdn Bhd v. Balakrishnan Devaraj & Anor [2011] 9 CLJ 133 FC ***(refd)***

Berjaya Times Square Sdn Bhd v. M-Concept Sdn Bhd [2010] 1 CLJ 269 FC ***(refd)***

Bima Investment Pte Ltd v. Hong Fok Realty Pte Ltd [1990] 1 SLR 254 ***(refd)***

Bounty Dynamics Sdn Bhd v. Chow Tat Ming & Ors [2015] 9 CLJ 422 CA ***(refd)***

Ching Yik Development Sdn Bhd v. Setapak Heights Development Sdn Bhd [1997] 1 CLJ 287 CA ***(refd)***

Chua Moh Huat, Dennis v. Harvester Baptist Church Ltd [1992] 1 CLJ 229; [1992] 4 CLJ (Rep) 258 CA ***(refd)***

Dunbar Bank Pie v. Nadeem [1998] 3 All ER 876 ***(refd)***

Egerton v. Jones [1939] 2 KB 702 ***(refd)***

Evans v. Bartlam [1937] AC 473 SC ***(refd)***

Gan Yook Chin & Anor v. Lee Ing Chin & Ors [2004] 4 CLJ 309 FC ***(refd)***

Hadmor Productions Ltd v. Hamilton [1983] 1 AC 191 ***(refd)***

Lee Ing Chin & Ors v. Gan Yook Chin & Anor [2003] 2 CLJ 19 CA ***(refd)***

Low Keang Guan v. Sin Heap Lee-Marubeni Sdn Bhd [2005] 1 LNS 289 HC ***(refd)***

LSSC Development Sdn Bhd v. Thomas Iruthayam & Anor [2007] 2 CLJ 434 CA ***(refd)***

New Zealand Insurance Co Ltd v. Ong Choon Lin [1992] 1 CLJ 44; [1992] 1 CLJ (Rep) 230 SC ***(refd)***

Newbigging v. Adam (1886) 34 Ch D 582 ***(refd)***

Sim Thong Realty Sdn Bhd v. Teh Kim Dar [2003] 3 CLJ 227 CA ***(refd)***

Tien Ik Sdn Bhd & Ors v. Peter Kuok Khoon Hwong [1993] 1 CLJ 9 SC ***(refd)***

TTDI Jaya Sdn Bhd v. Yew Hong Teng & Anor [2017] 1 CLJ 436 CA ***(refd)***

Vijayalakshmi Devi Nadchatiram v. Dr Mahadevan Nadchatiram & Ors [1995] 3 CLJ 493 FC ***(refd)***

Legislation referred to:
Contracts Act 1950, ss. 40, 56(1)
Housing Development (Control and Licensing) Regulations 1989, Schedule G

For the appellant - Brian Foong Mun Loong & Lim Ke Xin; M/s Chooi & Company + Cheang & Ariff
For the respondent - Joy Appukuttan; M/s KH Lim & Co

[Editor's note: Appeal from High Court, Shah Alam; Civil Suit No: 22NCVC-739-12-2013 (overruled in part).]

Reported by S Barathi

JUDGMENT

Lee Heng Cheong JCA:

Introduction

[1] The respondent/plaintiff bought a three-storey bungalow residential building held under the title particulars H.S.(D) 137542 P.T. 51590 in Mukim Cheras, District of Ulu Langat in the State of Selangor bearing postal address No. 18, Jalan Palma 1/1F, Taman Bukit Palma, Sg Long, 43000 Kajang, Selangor ("the property") from the appellant/defendant, at the price of RM2,500,000.

[2] The parties then signed a sale and purchase agreement dated 28 June 2010 ("SPA") which is a statutory agreement in Housing Development (Control and Licensing) Act 1966 ("HDA 1966") and in the form of Schedule G of the Housing Development (Control and Licensing) Regulations 1989.

[3] As the property was a show unit, the respondent/plaintiff also agreed to purchase the property together with all fixtures, fittings and interior design works in the property at the price of RM450,000 through a supplemental agreement dated 28 June 2010 ("SA").

[4] The property was registered in the respondent/plaintiff's name and charged to OCBC Bank (Malaysia) Bhd on 13 October 2010.

[5] On 2 September 2013, the respondent/plaintiff terminated the SPA and the SA (collectively "the agreements") and initiated a suit against the appellant/defendant on 30 December 2013, claiming for *inter alia*, rescission of the agreements.

[6] The respondent/plaintiff had continued to pay the purchase price of the property and had fully settled the same on 1 October 2014.

[7] The respondent/plaintiff then instituted legal action against the appellant/defendant.

A

Decision Of The High Court

[8] After a full trial, the High Court granted judgment in favour of the respondent/plaintiff on the following terms:

(i) a declaration that the sale and purchase agreement dated 28 June 2010 and the supplemental agreement dated 28 June 2010 are rescinded arising from the defendant's breach of the sale and purchase agreement dated 28 June 2010 and the supplemental agreement dated 28 June 2010 ("first order");

B

(ii) the appellant/defendant do pay the respondent/plaintiff, the sum of RM2,950,000 together with interest at the rate of 5% per annum from 27 December 2013 until full repayment ("second order");

C

(iii) The appellant/defendant do pay the respondent/plaintiff, the sum of RM62,232.90 together with interest at the rate of 5% per annum from 27 December 2013 until full repayment ("third order");

D

(iv) The appellant/defendant do pay the respondent/plaintiff, the sum of RM202,200.44 as at 30 November 2013 together with interest accruing thereon at the rate of 5% per annum from 27 December 2013 until full repayment ("fourth order");

E

(v) The appellant/defendant do pay the respondent/plaintiff, the respondent/plaintiff's loan interest repayment accruing from 1 December 2013 until full reimbursement by the appellant/defendant to be assessed and determined by this Honourable Court ("fifth order");

F

(vi) The appellant/defendant do pay the respondent/plaintiff, interests accruing thereon all sums awarded by this Honourable Court at the rate of 5% per annum from the date hereof 27 December 2013 until full repayment ("sixth order");

G

(vii) A declaration that the respondent/plaintiff is entitled to a lien on the property held under the title particulars H.S.(D) 137542 P.T. 51590 in Mukim Cheras, District of Ulu Langat in the State of Selangor bearing postal address No. 18, Jalan Palma 1/1F, Taman Bukit Palma, Sg Long, 43000 Kajang, Selangor (property) until such time the defendant has paid in full all monies, damages, interest and cost awarded by this court to the plaintiff (the "judgment sum"), and thereafter upon receipt of the full payment of the judgment sum, the plaintiff shall execute the transfer form in favour of the defendant with respect to the property within 14 days ("seventh order"); and

H

(viii) Cost of RM100,000.

I

[9] Being aggrieved by the decision of the High Court, the appellant/defendant appealed.

[10] We heard the appeal and after due deliberation and having carefully considered the submissions of both parties, we found that there are merits in the appeal and unanimously allowed the appeal in part with costs. We propose to give reasons for our decision with respect to the appeal.

[11] For ease of reference, the parties herein shall be referred to their respective capacities before the High Court.

Applicable Laws And Principles

[12] It is trite law that the function of an appellate court is one of review only. However, where the discretion has not been exercised judicially, that is to say, when the judge has committed an error of law or misconceived the facts or has not given sufficient weight to the relevant considerations or the decision would result in injustice, the court can interfere (see *Vijayalakshmi Devi d/o Nadchatiram v. Dr Mahadevan s/o Nadchatiram & Ors* [1995] 3 CLJ 493; [1995] 2 MLJ 709 (FC); *Tien Ik Sdn Bhd & Ors v. Peter Kuok Khoon Hwong* [1993] 1 CLJ 9; [1992] 2 MLJ 689 (SC); *Hadmor Productions Ltd v. Hamilton* [1983] 1 AC 191; *Evans v. Bartlam* [1937] AC 473 (SC); *New Zealand Insurance Co Ltd v. Ong Choon Lin* [1992] 1 CLJ 44; [1992] 1 CLJ (Rep) 230; [1992] 1 MLJ 185 (SC) and *Egerton v. Jones* [1939] 2 KB 702).

[13] We were mindful of the limited role of the appellate court in relation to findings of facts made by the court of first instance. In the case of *Lee Ing Chin & Ors v. Gan Yook Chin & Anor* [2003] 2 CLJ 19; [2003] 2 MLJ 97, the Court of Appeal held as follows:

> ... an appellate court will not, generally speaking, intervene unless the trial court is shown to be plainly wrong in arriving at its decision. **But appellate interference will take place in cases where there has been no or insufficient judicial appreciation of the evidence**.
>
> (emphasis added)

[14] Reference is also made to the decision of the Federal Court in *Gan Yook Chin & Anor v. Lee Ing Chin & Ors* [2004] 4 CLJ 309 where the Federal Court held that the test of "insufficient judicial appreciation of evidence" adopted by the Court of Appeal was in relation to the process of determining whether or not the trial court had arrived at its decision or findings correctly on the basis of the relevant law and the established evidence.

[15] Bearing in mind, the above principles distilled from the above authorities, we will now consider the defendant's appeal.

Findings Of High Court

[16] The learned High Court Judge made *inter alia* the following findings in his grounds of judgment:

(i) that the liquidated ascertained damages ("LAD") should be calculated until the date the plaintiff took the keys to the property (see paras. 36 to 45 of the grounds of judgment).

(ii) The learned High Court Judge found that there was misrepresentation as the defendant had represented to the plaintiff, to deliver a "luxurious and high end" property, such as described in exh. P34 which is brochure of the property (see para. 52 of the grounds of judgment).

(iii) that there was a breach of the agreements in that the defendant did not obtain written approval from the plaintiff before making changes to the landscape (see para. 59 of the grounds of judgment) and that the fixtures and fittings purchased on an "as is where is" basis must be in perfect condition, without defects and the items delivered by the defendant are full of defects (see para. 62 of the grounds of judgment);

(iv) that the defendant failed to show that the defects occurred when the property was in the custody and control of the plaintiff (see paras. 63 to 65 of the grounds of judgment);

(v) that he prefers the evidence of the plaintiff's expert (PW3) over the defendant's expert (DW3) as DW3 did not visit and inspect the property (see para. 74 of the grounds of judgment); and

(vi) that the plaintiff is entitled to rescind the agreements because the defendant has failed to rectify the various defects in the property and its fixtures (see paras. 77 and 80 of the grounds of judgment).

The Appellant/Defendant's Contentions

[17] Before us, the defendant contended that the learned High Court Judge has *inter alia* erred in his various findings on the following grounds:

(i) the plaintiff has affirmed the agreements;

(ii) there is no misrepresentation; and

(iii) there is no total failure of consideration.

The Respondent/Plaintiff's Contentions

[18] The plaintiff's pleaded causes of action in the SOC are in essence as follows:

(i) that the plaintiff alleged that there was misrepresentation by the defendant and that the defendant had breached the defendant's representation; and/or

(ii) that there was a breach of contract by the defendant.

Our Decision

[19] From the pleadings and evidence of the plaintiff, we find that the plaintiff is seeking for rescission and restitution only. This is confirmed by the plaintiff during the course of trial, that what she sought from the defendant, is to "take back the property and just refund me what I have paid

for". In essence, the plaintiff is only seeking for restoration of her position as if the agreements were never entered into, that is, restitution. However, at the same time, the plaintiff also pleaded in sub-para. 15 of the SOC that the defendant had breached the agreements.

[20] In a situation where there is rescission by way of termination arising out of breach of contract, guidance can be found in *Berjaya Times Square Sdn Bhd v. M-Concept Sdn Bhd* [2010] 1 CLJ 269, where Zulkefli Makinudin FCJ (as he then was) held that:

> As regards the law on rescission of contract which is the main issue to be decided in the present case, I am of the view on the factual matrix of the case s. 56(1) should be read together with s. 40 of the Act in determining the question as to whether the appellant as the party that was obliged to perform its promise had refused to perform its promise in its entirety by not doing any of the things it promised to do within the time specified by the contract. **A reference to ss. 40 and 56(1) of the Act clearly showed that the right to rescind a contract by way of termination only arises when there has been a total failure of consideration**.
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> (emphasis added)

[21] As to what amounted to a total failure of consideration, the case of *LSSC Development Sdn Bhd v. Thomas Iruthayam & Anor* [2007] 2 CLJ 434; [2007] 4 MLJ 1 is pertinent. This is what the court held:

> *It follows that this is not a case where there was a fundamental breach by the defendant which resulted in the plaintiffs being deprived of - to borrow the words of Lord Diplock in Photo Productions -substantially the whole benefit which it was the intention of the parties that they should obtain from the contract. The defendant's breach did not go to the root of the contract. The contract was therefore not "voidable' under s 56(1). Hence, the plaintiffs were not entitled to terminate it. Their termination was therefore unlawful.*
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> (emphasis added)

[22] In *LSSC Development Sdn Bhd v. Thomas Iruthayam & Anor*, *supra*, the court further held that rescission by way of termination arising from a breach of contract is a common law right, which is set out in s. 40 read together with s. 56(1) of our Contracts Act 1950. This is what the court held:

> *The question, then, in each case must be this: Did the defendant fail to perform every part of his promise*? If the answer is 'No', then s. 56(1) has no application. In my judgment, given the facts of the present instance, ss. 40 and 56(1) should be read together. *When that is done, the question that arises for determination is whether the instant defendant refused to perform its promise in its entirety by not doing any of the things it promised to do within the time specified by the contract*.

[23] The plaintiff, in seeking for rescission by way of termination of the agreements as prayed for in the SOC, must prove that there has been a total failure of consideration whereby the defendant committed a fundamental breach of the agreements which goes to the root of the agreements.

[24] In the absence of any total failure of consideration, the plaintiff can not avail herself of the right to rescind. This is what the court in *Berjaya Times Square Sdn Bhd v. M-Concept Sdn Bhd* (*supra*), said, at p. 284:

> *Absent a total failure of consideration, the common law right to rescind does not exist*. Goff & Jones "*The Law of Restitution*" (6th edn) which is the leading text on the subject has this to say at p. 502, para. 20-007:
>
> > *A breach of contract may be so fundamental that it deprives the 'party who has further undertakings still to perform of substantially the whole benefit which it was the intention of the parties as expressed in the contract that he should obtain as the consideration for performing those undertakings.'* (*Hong Kong Fir Shipping Co Ltd v. Kawasaki Kaisen Kaisha Ltd* [1962] 2 QB 26). *The innocent party has then an election. He may affirm the contract or he may bring it to an end. In the latter event, if he has paid money to the defendant under the contract, he can, as an alternative to claiming damages, sue for recovery of the money provided that the consideration for the payment has wholly failed; if the consideration has partially failed, his only action is for damages*.
>
> *In other words, where there has been a total failure of consideration, the innocent party has the alternative remedy of suing to recover monies paid under the contract to the guilty party. But he can under no circumstances have his money returned and claim damages. And if the consideration has only partially failed, he may only claim damages*. (emphasis added)

[25] In the instant appeal, we find that there is no total failure of consideration as the plaintiff took vacant possession of the property and exercised her rights under the agreements, by taking the keys of the property on 12 September 2012, inspecting the property on 12 September 2012 and submitting her defect checklist to the defendant and again submitted her defect checklists on 26 September 2012 and 3 October 2012 respectively (see senarai semak kerosakan (defect checklist) at pp. 218 to 222 of CCB Vol. 2 and senarai kerosakan (list of defects) at pp. 368 to 372 of CCB Vol. 3), claiming for LAD pursuant to cl. 22(2) of the SPA and continuing to pay the bank loan taken out to purchase the property notwithstanding having terminated the agreements and having the property transferred to her name. In the light of the above, we also find that the plaintiff has also affirmed the agreements. Thus the plaintiff cannot rescind the agreements and seek restitution.

[26] Guidance can be found in *TTDI Jaya Sdn Bhd v. Yew Hong Teng & Anor* [2017] 1 CLJ 436 which facts are similar to the instant appeal before us where the Court of Appeal found that the claim by the plaintiff in the said case for a rescission is an afterthought. This is what the Court of Appeal in *TTDI*'s case (*supra*) said:

> [53] The High Court had also failed to consider the conduct of the plaintiffs in submitting their complaints form dated 10 November 2004 which was done about two months after the defendant's letter dated 29 September 2004 had been issued notifying them that the property was

completed and ready to be delivered to the plaintiffs. There was clear evidence that the plaintiffs had accepted vacant possession of the property as provided in the SPA and had even identified some 160 defects to be rectified by the defendant. *If it was true, as claimed by the plaintiffs that there was total failure of consideration, a reasonable purchaser would have rejected the property at the outset and exerted his rights for a rescission of the SPA* and not wait for several years to elapse before deciding to rescind the SPA and/or proceeded to fill up the complaints form to complain about the defects to be rectified by the defendant.

[54] There were overwhelming evidence before the learned judge that the plaintiffs' action to claim for a rescission of the SPA was merely an afterthought, unsupported by contemporaneous documents and/or evidence. The following conduct would strengthen our findings that this was merely an afterthought and was introduced by the plaintiffs at this late stage to justify their claim for a rescission of the SPA:

(a) The plaintiffs had submitted the complaint forms *vide* Complaints Form No. 01463 in response to the notice issued by the defendant that the property was ready for delivery of vacant possession;

(b) *The plaintiffs continued to repay the housing loan to their financier, Maybank until the Loan had been fully paid and discharged form had been signed*;

(c) The plaintiffs had paid all outgoings such as quit rent of the said property as required under the SPA; and

(d) *The plaintiffs consented for their names to be registered in the issue document of title to signify that they are the registered owners of the property. They continue to be registered owners of the property up to now and three years preceding the commencement of this action.*

(emphasis added)

[27] The Court of Appeal in *TTDI*'s case *supra* subsequently further held that under such circumstances, there was no total failure of consideration:

[58] The facts as shown in para. 37 were significant to demonstrate to the court that *the plaintiffs had exercised their rights pursuant to the SPA to affirm the terms and conditions of the SPA. The plaintiff could not at this stage claim that there was total failure of consideration* especially when they had sat on their rights to pursue a claim for rescission. The plaintiff had further exercised their rights under cl. 25(1) to request the defendant to rectify the 160 defects complained in the Complaint Forms No. 01463.

...

[64] Guided by the above high authorities, we were of the view that the remedy of a rescission ought not to be allowed by the High Court as *we were satisfied that there was no total failure of consideration. The defendant in the instant case did not refuse or had failed to perform the promise in its entirety. There was overwhelming evidence that the property had been completed and a certificate*

A *of practical completion dated 5 July 2004 and the certificate of fitness dated 29 September 2004 had been issued by the relevant authority*. The property had been registered in the names of the plaintiffs about three years before the filing of the current action.

[65] In view of the fact that the plaintiffs had not formally rejected the
B said property and rescinded the SPA at the first opportunity available to them but had instead elected to affirm the SPA by submitting the defects list and threatening to rectify the defects on their own (see p. 871 of Ikatan Teras Bersama (Bahagian C) Jilid 2), we were of the view that the order of rescission made by the learned judge was improper and ought to be set aside by this court.

C (emphasis added)

[28] Since the plaintiff has affirmed the agreement, the learned High Court Judge ought not to have granted an order of rescission.

[29] Support can be found in *TTDI*'s case (*supra*) where the court also held
D that:

[64] ... The plaintiffs had not taken any steps to stop the release of the financing from their financier, Maybank and/or the transfer of the property in their names on 12 September 2006, when they knew about the condition of the property very early ie, on 10 November 2004.

E [65] In view of the fact that the plaintiffs had not formally rejected the said property and rescinded the SPA at the first opportunity available to them but had instead *elected to affirm the SPA by submitting the defects list and threatening to rectify the defects on their own (see p.871 of Ikatan Teras Bersama (Bahagian CJ Jilid 2), we were of the view that the order of rescission made by the*
F *learned judge was improper and ought to be set aside by this court*.

(emphasis added)

[30] We thus find that in granting an order of rescission and LAD simultaneously to plaintiff, the learned High Court Judge erred in law and in fact, in granting inconsistent remedies and in disregard of the Court of
G Appeal's decision in *Berjaya Times Square Sdn Bhd v M-Concept Sdn Bhd* (*supra*) where the Court of Appeal held *inter alia*:

In other words, *where there has been a total failure of consideration, the innocent party has the alternative remedy of suing to recover monies paid under the contract to the guilty party. But he can under no circumstances have his money returned and*
H *claim damages*. And if the consideration has only partially failed, he may only claim damages. (emphasis added)

[31] In the event, the alleged breach of contract is not fundamental, it is only a breach of warranty; this is what the court in *Ching Yik Development Sdn Bhd v. Setapak Heights Development Sdn Bhd* [1997] 1 CLJ 287; [1996]
I 3 MLJ 675 held:

> Where the term that has been flouted is fundamental to the contract, the innocent party is entitled to treat himself as being discharged from further obligations under it. *But where the obligation that has been breached is only subsidiary or minor in nature, the innocent party may not treat himself as being free of his obligations under the contract, although he may sue and recover damages for the non-performance of the subsidiary term*.
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> (emphasis added)

[32] We also noted that the learned High Court Judge did in fact find the defects in the property and that such defects did not render the property inhabitable. This is what he said:

> [83] Tidak dinafikan bukan semua kerosakan/kecacatan yang disenaraikan oleh Plaintif dalam Defect List dan aduan susulan beliau adalah serius. **Saya bersetuju dengan peguam terpelajar Defendan bahawa terdapat 'kerosakan/kecacatan' yang bukanlah diakibatkan oleh kerja pembinaan yang tidak sempurna** tetapi tidak dijaga dan tidak diselenggara selama lebih 2 tahun. Sebagai contoh kesan lumut (moss) dan rumput liar. **Saya bersetuju 'kecacatan' tersebut suatu yang tidak membuat rumah tersebut tidak boleh dihuni (inhabitable). 'Kecacatan' tersebut boleh diperbetulkan dengan mudah**. Pada hemat saya kerosakan/kecacatan kecil sebegitu semata-mata tidak mencukupi untuk Plaintif menamatkan Perjanjian-perjanjian dengan Defendan.
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> (emphasis added)

[33] We are of the considered opinion that from the learned High Court Judge's above finding namely that the defects were not as a result of building defect and that the property was not inhabitable, there is no total failure of consideration on the part of the defendant. Thus, we find that the learned High Court Judge has erred in fact and/or in law when he granted the plaintiff's claim for rescission when there is no total failure of consideration and whilst at the same time he found that the defects in the property did not render the property, inhabitable.

Misrepresentation

[34] From our reading of the plaintiff's pleading in respect of misrepresentation in her SOC, we noted that the plaintiff did not plead whether such misrepresentation was fraudulent or negligent. In the light of such a situation, the plaintiff's claim for misrepresentation shall be treated as one of innocent misrepresentation.

[35] Support can be found in *Sim Thong Realty Sdn Bhd v. Teh Kim Dar* [2003] 3 CLJ 227; [2003] 3 MLJ 460, where the Court of Appeal held *inter alia* as follows:

> It is clear that the defendant's pleaded case alleges neither fraud nor negligence. All the defendant has pleaded is the misrepresentation about the access to the land. Absent a specific and particularised plea of fraud or negligence, the defendant must be taken as asserting a case of innocent misrepresentation in the sense already discussed.

[36] Since the plaintiff's claim is for innocent misrepresentation, the applicable remedy is that of rescission and the innocent party may not recover damages. This was stated by Gopal Sri Ram JCA (as he then was) in *Sim Thong Realty Sdn Bhd, supra* where he followed the rule as approved by Merritt LJ in *Dunbar Bank Pie v. Nadeem* [1998] 3 All ER 876, at p. 886 in *Newbigging v. Adam* (1886) 34 Ch D 582:

> The applicant for an order for a transaction to be set aside on the ground of undue influence or for any other invalidating tendency, as they were described by Lord Browne-Wilkinson in *Barclays Bank pie v. O'Brien* [1993] 4 All ER 417 at 424, must as a condition for relief give back all he obtained from the transaction (see *Erlanger v. New Sombrero Phosphate Co* (1878) 3 App Gas 1218). *The matter was put clearly by Bowen LJ in Newbigging v. Adam (1886) 34 Ch D 582 at 592 where he said*:
>
> > *... when you come to consider what is the exact relief to which a person is entitled in a case of misrepresentation it seems to me to be this, and nothing more, that he is entitled to have the contract rescinded, and is entitled accordingly to all the incidents and consequences of such rescission. It is said that the injured party is entitled to be replaced in status quo. It seems to me that when you are dealing with innocent misrepresentation you must understand that proposition that he is to be replaced in status quo with this limitation – that he is not to be replaced in exactly the same position in all respects, otherwise he would be entitled to recover damages, but is to be replaced in his position so far as regards the rights and obligations which have been created by the contract into which he has been induced to enter. That seems to me to be the true doctrine*, and I think it is put in the neatest way in *Redgrave v. Hurd* ((1881) 20 Ch D 1).
>
> In the later passage to which I referred, Bowen LJ added (at p. 595):
>
> > There ought, as it appears to me, to be a giving back and a taking back on both sides, including the giving back and taking back of the obligations which the contract has created, as well as the giving back and the taking back of the advantages.
>
> (emphasis added)

[37] In *Berjaya Times Square Sdn Bhd v. M-Concept Sdn Bhd* (*supra*), the Court of Appeal dealt with the effect of the remedy of rescission:

> [15] Some writers continue to use the word rescind in this sense. Professor G.H Treitel is one. See, Trietel's "*Law of Contract*", (11th edn). But this rescission is very different from the specific relief of rescission invented by the court of Chancery. **The right to terminate puts an end to the contract only as to the future. All past rights and duties under the contract remain unaffected**. But that is not the case where the equitable remedy of rescission is obtained by a decree from the court or by self-help. An example that illustrates rescission as a self-help remedy is *Car and Universal Finance v. Caldwell* [1965] 1 QB 525. **The remedy of rescission has the effect of restoring the parties to the same position as though the**

contract was never made. In other words, there is *restitutio in integrum*. Where it is impossible to restore the *status quo ante*, the court may grant equitable compensation as happened in *Longstaff v. Birt/es* [2001] EWCA (Civ) 1219, a case of breach of fiduciary duty. (emphasis added)

[38] We also noted that the plaintiff did not elect whether to pursue her claim, on the ground of misrepresentation or breach of contract and instead proceeded to claim both remedies which we find, is inconsistent with one another and both cannot be allowed to subsist or co-exist together.

[39] In *Bounty Dynamics Sdn Bhd v. Chow Tat Ming & Ors* [2015] 9 CLJ 422; [2016] 1 MLJ 507, the Court of Appeal held that:

[50] We found that, in connection with the order on damages to be assessed granted by the learned JC, there were elements of duplicity. **A plaintiff must in law decide whether he is pursuing a claim on misrepresentation or breach of contract**. He is not entitled to be awarded damages both for misrepresentation and breach of contract. Once a representation becomes a clause in the contract such as argued here by the respondents, there could not therefore be an order for damages to be assessed for both misrepresentation and breach of contract.

[40] Further support can be found in *Low Keng Guan v. Sin Heap Lee-Marubeni Sdn Bhd* [2005] 1 LNS 289; [2005] 7 MLJ 216 where the court similarly held as follows:

A term of the contract and representation are two different things. They are poles apart. Both cannot co-exist. At the trial, the plaintiff did not elect as to which was the cause of action: whether it was a breach of the term or misrepresentation. The cumulative plea of a breach of a term and misrepresentation is mutually inconsistent and both must, in law, fail for want of certainty. Once a representation becomes a term of a contract, the representation ceases and has become part of the contract. But where the representation was not included as a term of the contract, that representation would continue its independent existence. And where the representation is included as a term of the contract then that representation is 'merged' into the contract and incorporated into the contract. When that happens the remedy will lie for breach of contract. A classic example would be the case of *Pennslyvania Shipping Co v. Compagnie Nationale De Navigation* (1936) 2 KBD 1167 and there Branson J laid down the law in these fine words (seep 1171 of the report):

> It is there pointed out that at common law if an innocent misrepresentation did not afterwards become part of the contract its untruth was immaterial. In such a case equity might intervene to avoid or rescind the contract. But where the representation has been embodied in the contract there the courts of common law could deal with it according to whether it was a condition entitling the injured party to repudiate the contract or a warranty giving rise only to an action *ex contractu* for damages. The representation thus becomes merged in the higher contractual right, and there was no need to resort to equity for rescission. ...

[41] Thus, it is clear that the remedy of rescission as a result of misrepresentation and breach of contract could only be awarded if the plaintiff can prove innocent misrepresentation or a total failure of consideration.

[42] From the above authorities, we find that it is settled that in the event the plaintiff is successful in proving innocent misrepresentation, the plaintiff would only be entitled to rescission *ab initio* and no damages. Thus, we find that the learned High Court Judge's grant of an order of rescission as in the first order and at the same time, also with an award of damages as in the third order, to be wrong and contrary to decided cases.

[43] Further, in *TTDI Jaya Sdn Bhd v. Yew Hong Teng & Anor* (*supra*), the court clearly held that:

> Looking at the learned judge's order in totality, it would appear *that the order for 10% damages for late delivery of the property along with the order for a rescission of the SPA made by the High Court was erroneous and not in line with the accepted principle*.
>
> (emphasis added)

[44] Another issue which arose from the learned High Court Judge's granting of the first order relates to the rescission of the agreements which is contrary to decided cases and principles namely that there can be no rescission arising out of innocent misrepresentation after full conveyance of a property. Support can be found in *Admiral Cove Development Sdn Bhd v. Balakrishnan Devaraj & Anor* [2011] 9 CLJ 133 where the Federal Court held *inter alia* as follows:

> We are of the similar view. We would agree that delay in pursuing an action for rescission of a contract could be fatal. *More importantly, the above judgment of Jenkins LJ pointed out that so far as dealings on land are concerned, there is a considerable body of authority to the effect that rescission on the ground of innocent misrepresentation will not be allowed after conveyance*.
>
> (emphasis added)

[45] In respect of the other evidence adduced and the grounds of judgment, we find that there was a lack of judicial appreciation of the available evidence and application of the relevant laws by the learned High Court Judge who found at para. 52 of his grounds of judgment that the plaintiff only purchased the property after having seen the property. This is what he said:

> ... Plaintif telah tertawan untuk membeli rumah tersebut setelah melihat gambar-gambar tersebut serta melihat rumah itu sendiri.

[46] In the plaintiff's testimony, she also stated the same. This is what she said:

> FML So before you paid the booking fees, you went there three times?

HELENA Yes.

FML After you paid the booking fees, how many times you went?

HELENA I can't remember, maybe another three times.

Cross-examination of the respondent on 21.5.2015 at pages 577 to 578 of ROA Vol. 2(8).

[47] From the above, we find that the learned High Court Judge's findings hence are inconsistent with his finding of misrepresentation based on exh. P34 which is the brochure of the property. We find that the plaintiff did not rely on exh. 34, in coming to a decision to purchase the property but rather as a result of inspections made on several visits to the property.

[48] We further find that there is no misrepresentation based on exh. P34 because after the plaintiff saw exh. P34 and subsequently went to view the property, she was in fact impressed with the property. This is consistent with the learned High Court Judge's finding. Since the plaintiff had seen and inspected the property after having looked at exh. P34, there is no issue of the plaintiff, relying solely on exh. P34.

[49] In light of the above, we are of the opinion that the learned High Court Judge erred in holding that there was misrepresentation and in allowing the plaintiff's claim for rescission. Further, since there is no innocent misrepresentation, the remedy of rescission is not available to the plaintiff.

[50] One of the plaintiff's contentions is that the defendant is in "breach of the agreements" namely the SPA and SA. Based on the plaintiff's pleadings in sub-paras. 15.2 and 15.3 of the SOC, the plaintiff pleaded that the defendant had breached the agreements, by not delivering the property in accordance to the agreements and that the defendant did not remedy the defects in the property.

[51] At paras. 59 and 60 of the grounds of judgment of the learned High Court Judge, he agreed with the plaintiff's contention and held that the defendant has breached cl. 13 of the SPA when the defendant made changes to the landscape of the property.

[52] This is what cl. 13 of the SPA states:

Material and workmanship to conform to description

13. The said Building shall be constructed in a good and workmanlike manner in accordance to the description set out in the Fourth Schedule hereto and in accordance with the plans approved by the Appropriate Authority in the Second Schedule) which descriptions and plans have been accepted and approved by the Purchaser, as the Purchaser hereby acknowledges. No changes thereto or deviations therefrom shall be made without the consent in writing of the Purchaser except such as may be required by the Appropriate Authority. The Purchaser shall not be liable

A for the cost of such changes or deviations and in the event that the changes or deviations involve the substitution or use of cheaper materials or the commission of works originally agreed to be carried out by the Vendor the Purchaser shall be entitled to a corresponding reduction in the purchase price herein or to damages, as the case may be.

B **[53]** A perusal of cl. 13 of SPA would reveal that the landscaping of the property was never provided for or described in the second and fourth schedules of the SPA. Thus, there cannot be a breach of the SPA in a such situation. In the premises, we find that the learned High Court Judge's above finding is erroneous as cl. 13 of the SPA referred to the material and workmanship to conform to description and not landscaping.

C

[54] Further, at para. 62 of the grounds of judgment of the learned High Court Judge, he held that the fixtures and fittings under the SA must be in "keadaan sempurna" when the plaintiff purchased them from the defendant, on an "as is where is" basis. This again is erroneous.

D **[55]** Support can be found in *Chua Moh Huat, Dennis v. Harvester Baptist Church Ltd* [1992] 1 CLJ 229; [1992] 4 CLJ (Rep) 258, where the Court of Appeal stated as follows:

In our view, that construction is also wrong. Clause 6 served the same function as an "as is where is" clause in an agreement for the sale of goods, the purpose of which is to exclude any of the warranties as to merchantability, etc. implied under legislation relating to the sale of goods. Accordingly, Clause 6 expressly excluded any warranty or condition as to the state and condition of property, and also, in consequence, its fitness for habitation.

E

(emphasis added)

F **[56]** It is undisputed that there are defects in the property and we find that not all the defects were rectified. We further find that there is an issue of whether the plaintiff's contention that the breach of the agreements is a breach of condition of the agreements or that of warranty.

G **[57]** We noted that the learned High Court Judge found as follows:

Saya bersetuju 'kecacatan' tersebut suatu yang tidak membuat rumah tersebut tidak boleh dihuni (inhabitable). 'Kecacatan' tersebut boleh diperbetulkan dengan mudah. Pada hemat saya kerosakan/kecacatan kecil sebegitu semata-mata tidak menamatkan perjanjian-perjanjian dengan Defendan.

H

[58] The learned High Court Judge further found that the plaintiff was entitled to rescission because the defendant purportedly refused to continue rectification at para. 84 of his grounds of judgment:

I [84] Namun dalam kes kita ini, oleh kerana terdapat begitu banyak kecacatan/kerosakan yang mana Defendan memutuskan untuk tidak meneruskan pembaikan. Dalam keadaan itu, pada hemat saya tindakan Plaintif menamatkan Perjanjian-Perjanjian adalah sah dan seterusnya

tindakan beliau menuntut supaya Defendan mengambil balik rumah dan barang/kelengkapan dan membayar balik segala perbelanjaan berkaitan pembelian rumah tersebut, suatu tindakan yang patut dan munasabah.

[59] From the above findings of the learned High Court Judge, we are of the opinion that notwithstanding the various defects in the property, they are rectifiable and the property and the fittings which are the subject matter of the agreements, is still habitable. As such, the breaches are not fundamental and are that of a warranty and the refusal or omission of the defendant to rectify the defects, do not entitle the plaintiff to claim for rescission and for the learned High Court Judge, to grant an order of rescission.

[60] When a party terminates an agreement, relying on a breach of a non-fundamental term, such termination is unlawful. In *Ching Yik Development Sdn Bhd v. Setapak Heights Development Sdn Bhd* [1997] 1 CLJ 287; [1996] 3 MLJ 675, the court held as follows:

Now, in every contract, be it for the sale of land or any other commodity, there are, generally speaking, some terms that are of fundamental importance and others of less or minor importance. The law creates the distinction for the purpose of determining the kind of remedy that is to be made available to an innocent party, ie, the party who is not guilty of a breach. Where the term that has been flouted is fundamental to the contract, the innocent party is entitled to treat himself as being discharged from further obligations under it. But where the obligation that has been breached is only subsidiary or minor in nature, the innocent party may not treat himself as being free of his obligations under the contract, although he may sue and recover damages for the non-performance of the subsidiary term. The rules that operate in this area of the law of obligations produce further consequence. *A party who terminates a contract or treats it as having come to an end in reliance upon the breach of a non-fundamental term is himself guilty of a breach of contract.*

(emphasis added)

[61] It is clear that the plaintiff's contention of breach of agreements by the defendant, did not tantamount to any failure of consideration or breach of condition which goes to the root of the agreements. The plaintiff's allegation of breach is only an allegation of breach of warranty which entitled the plaintiff, only to damages.

[62] In *Bima Investment Pte Ltd v. Hong Fok Realty Pte Ltd* [1990] 1 SLR 254, the court held *inter alia* that:

I now turn to the right of the plaintiffs as the purchasers to repudiate the agreement and to enforce rescission by the judgment of this court, as they assert. Where the property which the defendants as vendors have agreed to convey is not substantially the same as the property contracted to be sold, the plaintiffs as purchasers are entitled to repudiate. **They may not repudiate for trifling defects which may properly be matters for compensation**.

(emphasis added)

[63] On the contrary, the plaintiff's termination of the agreements on the premise of breach of warranty is unlawful and such unlawful termination is a breach of the said agreements (see *Ching Yik Development Sdn Bhd v. Setapak Heights Development Sdn Bhd* (*supra*).)

[64] Thus, we find that the learned High Court Judge has erred in fact and/or in law when he allowed rescission of the agreements and awarded damages at the same time.

Conclusion

[65] Based on all the reasons, that we have explained, we are of the considered opinion that the decision of the learned High Court Judge is contrary to the established principles of law. In the premises, we find merit in the appeal. We allow the appeal in part. We set aside the decision of the High Court except for its award of the LAD for the sum of RM62,232.90 with the interest granted by the learned High Court Judge since the respondent/plaintiff elected to claim for the LAD and submitted a list of defects for appellant/defendant to rectify the defects. Thus respondent/plaintiff's claim should be limited to damages arising from the failure of the appellant/defendant to make good of the defects and to comply with the specific condition as stipulated in the sale and purchase agreement and the supplemental agreement.

[66] In the interest of justice, the matter is sent back to the High Court for the assessment of damages based on our above directions. Parties are at liberty to call further witnesses if necessary but only for the purpose of assisting the court in assessing the damages.

[67] As for costs, we allow the plaintiff, the sum of RM60,000 in the High Court and costs of RM10,000 to the defendant for this appeal, both subject to allocator fees.